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No. 81-113

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DEWEY SOWDERS, Superintendent, Kentucky State Penitentiary - - - Petitioner

versus

EARL WAYNE WILEY - - - - - Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

IN THE

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DEWEY SOWDERS, Superintendent,
Kentucky State Penitentiary - - *Petitioner*

v.

EARL WAYNE WILEY - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Respondent has made several factual misstatements in his Brief in Opposition [hereinafter cited BO] which the Petitioner feels merit reply.

First, Respondents suggests that Wiley's principle contention on appeal to the Kentucky Supreme Court was that "his lawyer admitted guilt on his behalf without his permission" (BO 6). In fact, this was not the case. Wiley contended in the Kentucky Supreme Court that whether or not he acquiesced in his trial counsel's strategy was irrelevant because the "courts have recognized that even an informed admission of guilt may, under some circumstances, trigger the need for a *Boykin* inquiry" (see Respondent's Brief in Kentucky Supreme Court at p. 18). It is thus apparent that in actuality, Wiley's contention in the

Kentucky Supreme Court was first, that his trial counsel's tactic was an ineffective one; and secondly, that regardless of his consent or lack thereof, there had to be an on-the-record inquiry pursuant to *Boykin* showing whether or not he knowingly, voluntarily and intelligently consented to his counsel's action. Accordingly, Respondent's statement that his principle contention in his state appeal was a factual one, with repect to the consent issue, is totally without basis.

Secondly, Respondent states in his Brief in Opposition that the Kentucky Supreme Court permitted trial counsel for Respondent "to file an amicus curiae brief in support of the Commonwealth's position" on appeal (BO 6). This is absolutely false. Trial counsel filed the amicus curiae brief of their own volition to explain their trial strategy to the Kentucky Supreme Court (see the amicus brief filed as part of the Sixth Circuit Joint Appendix, hereinafter JA 137-147). They were not supporting the Commonwealth in any way, shape or form and that was understood when the amicus brief was filed.

Thirdly, Respondent inappropriately attempts to interject the case of his brother, Elmer, into this proceeding (BO 7). It is true that in his response to the amicus curiae brief filed by trial counsel in the Kentucky Supreme Court, Elmer claimed he did not consent to the trial strategy and attached an affidavit to that effect (Brief for Elmer Wiley in Response to Amicus Curiae Brief, hereinafter EWB 1, Exhibit A). The affidavit filed by Elmer in his habeas corpus action in the United States District Court was controverted by

an opposing affidavit of both trial counsel stating they had informed Earl and Elmer Wiley of their trial strategy and that both men agreed to it. However, since this Court is not faced with the case of Elmer Wiley any refernce to the record in his case, which is not before this Court, is clearly inappropriate. Petitioner need only point out to this Court that Respondent in this case, Earl Wayne Wiley, did not file such an affidavit in the Kentucky Supreme Court supporting his allegation of non-consent, and that no such affidavit was before the Sixth Circuit when it rendered its decision.

Fourthly, the Respondent again argues in his Brief in Opposition that the factual importance of the allegedly unconsented-to admission of guilt was raised in the United States District Court and never challenged by Kentucky (BO 8). The Respondent cites a portion of his memorandum filed in the District Court stating, "Petitioner never acquiesced in counsel's admission of guilt . . ." (BO 8, JA 163). However, the Respondent neglects to supply this Court with the remainder of the sentence which diminishes the factual importance of consent to the resolution of the legal issues in the case: "in any event that circumstance is irrelevant, for courts have recognized that even an *informed* admission of guilt may, under certain circumstances, trigger the need for a *Boykin inquiry*" (Earl Wiley's Habeas Corpus Memorandum, hereinafter HCM 17-18). It thus becomes apparent that the reason Kentucky never challenged the consent issue in District Court was because Earl Wiley did not make it

an issue. Respondent also points out in his Brief in Opposition that Sowders did not request an evidentiary hearing on this issue but that Wiley did (BO 8). This is not technically correct. Wiley did not request an evidentiary hearing in his petition for writ of habeas corpus. It was not until after the magistrate's report was filed, recommending that the petition be denied, that Wiley sought to have an evidentiary hearing.

Fifth, the Respondent correctly points out that the Sixth Circuit held "that . . . an alleged consent in the present case cannot be presumed from a silent trial record" (BO 10). However, the Sixth Circuit then turned around and presumed a *lack of consent from a silent record* and made a factual finding when there was no evidence in the record to support it.

Sixth, with respect to the exhaustion argument, Respondent suggests that the issue of consent to the trial strategy presented to the Sixth Circuit was also presented to the District Court and the Kentucky Supreme Court (BO 11). The Petitioner respectfully disagrees. In the Sixth Circuit, Respondent raised and vigorously argued, for the first time, the fact that whether or not Respondent had consented to his trial counsel's strategy was the controlling factor in determining whether there was ineffective assistance of counsel.

Seventh, Respondent would have this Court believe that it would be futile to require him to go back and exhaust state remedies with respect to his ineffective assistance of counsel claim (BO 12-15). He argues

that the trial court had already indicated that trial counsel performed competently, and the trial court was in full agreement of trial counsel's strategy (BO 13). Again, Petitioner disagrees. The issue of whether or not the Respondent and his brother had actually consented to the trial strategy was never presented to the trial court, and the trial judge could not have been aware of the consent issue at the time he made his affidavit. Clearly then, it cannot be said that it would be futile to require Wiley to exhaust state post-conviction relief procedures (Kentucky Rule of Criminal Procedure, hereinafter RCr 11.42) when the factual dispute concerning consent had never been brought to the trial judge's attention. Further, it was inconsistent for Respondent to argue in federal court that he had exhausted his state remedies while contending that a federal evidentiary hearing was necessary to resolve the facts in his favor. This type of factual contention should have been resolved in state court under the procedure provided for under RCr 11.42.

Eighth, Respondent suggests that Petitioner, Sowders, has "sandbagged" the question of the evidentiary hearing (BO 16). Sowders submits that the factual dispute question concerning consent to the trial strategy, which the Sixth Circuit made the basis of its decision, was never raised by Wiley until his brief in the Sixth Circuit. Therefore, Sowders should not be penalized for opposing an evidentiary hearing in the District Court, where the legal arguments raised by the Respondent were different than the ones raised by him for the first time in the Sixth Circuit. It is only

because of the fact that the Sixth Circuit made a factual finding as the basis of its opinion, that there was no consent by the Respondent to the trial strategy, that Petitioner is now presenting the argument that the Sixth Circuit should not have resolved the case without an evidentiary hearing.

Ninth, Respondent states that: "Sowders claims there is no evidence in the record to support the conclusion of the Sixth Circuit that Wiley did not consent to the two admissions of guilt by the two different lawyers" (BO 17). The Respondent further states that "there is no evidence to contradict the sworn assertions by the Wileys that they did not consent" (BO 28). Both statements are absolutely true because the factual dispute concerning consent was never argued as the most important factor by the Respondent's attorney until he reached the Sixth Circuit. This further demonstrates the need for an evidentiary hearing to resolve the consent issue.

Tenth, Respondent argues that the record is uncontradicted that counsel admitted his guilt during both portions of the trial without his consent (BO 22). Once again, there is no evidentiary record in this case either for or against Respondent on this point. The Sixth Circuit made a factual determination on this point without any evidence in the case other than unsubstantiated allegations. Again, the need for an evidentiary hearing on this point is manifest to an equitable determination of the issues.

Eleventh, Respondent argues about the apparent tactical inconsistency employed during the persistent

felony offender closing argument (BO 25). The Petitioner submits the argument about the counsel's confession of guilt in the persistent felony offender phase of trial was never raised by Respondent until he reached the Sixth Circuit.

Twelfth, Respondent correctly states that an attorney does not have the power to enter a plea which is contrary to the client's expressed plea in open court (BO 29). However, that is not the situation facing this Court in the case at bar. Trial counsel did not enter a guilty plea. It was only after the Respondent had challenged the evidence offered by the Commonwealth and presented his own evidence and had been accorded all the other rudiments of a fair trial by jury, that trial counsel employed a reasonable and competent trial tactic of conceding guilt to gain leniency for his client. This is a reasonable trial tactic since under Kentucky law, pursuant to RCr 9.84, the jury decides not only the question of guilt, but also sets the penalty (Petitioner's Appendix 71).

WHEREFORE, for the reasons set forth above and for the reasons enumerated in Petitioner's Writ of Certiorari, it is in the interest of justice that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058
Counsel for Petitioner

PROOF OF SERVICE

I, Michael R. Beiting, one of counsel for the petitioner, hereby certify that three copies of the foregoing Reply Brief for Petitioner were mailed postage prepaid this 16th day of October, 1981, to Hon. Kevin Michael McNally, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Kentucky 40601, Counsel for Earl Wayne Wiley.

Michael R. Beiting
by: Paul E Rakender Jr

MICHAEL R. BEITING
Assistant Attorney General
Counsel of Record for Petitioner